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No. PD-0398-17
In the
Court of Criminal Appeals
At Austin

No. 14-15-01078-CR
In the Court of Appeals for the
Fourteenth District of Texas at Houston

No. 2025101
In County Criminal Court at Law No. 1
Of Harris County, Texas

JOSE OLIVA
Appellant
V.
THE STATE OF TEXAS
Appellee

STATE'S BRIEF ON DISCRETIONARY REVIEW

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ORAL ARGUMENT PERMITTED

STATEMENT REGARDING ORAL ARGUMENT

This Court has permitted oral argument in this case.

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 68.4(a), a complete list of the names of all interested parties is provided below.

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Trial Judge:

Honorable Paula Goodhart

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TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT OF THE CASE

Appellant was charged by information with driving while intoxicated, and the information also alleged that he had a prior driving-while-intoxicated (DWI) conviction. (CR – 8) He was convicted and sentenced by a jury to 180 days in the Harris County Jail. (CR – 114-15)

On March 28, 2017, a panel of the Fourteenth Court of Appeals issued a published opinion reversing appellant's conviction and remanding the case for the trial court to reform the judgment to reflect a conviction for the lesser-included offense of Class B misdemeanor DWI and to conduct a new punishment hearing for the Class B misdemeanor conviction. *Oliva v. State*, ___S.W.3d___, No. 14-15-01078-CR (Tex. App.—Houston [14th Dist.] Mar. 28, 2017, pet. granted). The panel found that a prior DWI conviction is an element of Class A misdemeanor DWI-second offenses.[1]

This Court granted review on whether a prior DWI conviction is an element or a punishment enhancement in DWI-second offenses, in light of the current conflict in authority regarding this issue.

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[1] "DWI-second" refers to the Class A misdemeanor DWI offense in which the offender also has one prior DWI conviction. TEX. PENAL CODE § 49.09(a). Because more than one Class A misdemeanor DWI offense exists, the State will refer to the at-issue DWI offense as "DWI-second" for clarity and brevity. *See id.* § 49.04(d).

ISSUE PRESENTED

Whether a prior DWI conviction is an offense element or punishment enhancement in DWI-second offenses.

STATEMENT OF FACTS

Houston Police Department Officers Aldana and Habukiha were on patrol in the early morning hours of May 10, 2015, when they received a service call of a suspicious person asleep in a vehicle in the street. (RRIII – 11, 24-25, 27, 32-33) They arrived at the scene within a few minutes and found a vehicle parked in the street's eastbound lane. (RRIII – 12, 14, 25, 28, 32-34, 64-68; RRIV – 35-38) The vehicle was in park, the engine was running, and the key was in the ignition. (RRIII – 16, 23, 25, 35) The windows were down and no emergency lights or blinkers were activated. (RRIII – 16-18)

Appellant was alone in the vehicle, asleep while "kind of slouched over the driver's seat," and was not wearing a seatbelt. (RRIII – 16-17, 23, 33, 35, 36) Officer Habukiha did not remember whether appellant's feet were on the pedals. (RRIII – 68) One open beer container was in the cup holder. (RRIII – 36) Appellant did not initially respond when officers tried to wake him and, once he did awaken, he fell out of the car when the officers opened the door. (RRIII – 18-20) Appellant displayed various signs of intoxication and his breath-test results were .184 and .183. (RRIII – 7, 17-23, 34, 36-48, 54, 66, 68; RRIV – 17-18)

Appellant was charged with driving while intoxicated. (CR – 8) The information included a separate paragraph alleging he had a prior DWI conviction. (CR – 8) No mention was made about, and no evidence was presented regarding, the prior DWI conviction in the guilt phase of trial or in the guilt-phase jury charge. (*See* CR – 105-108) The jury convicted appellant. (RRIV – 51)

In the punishment phase, appellant pled "not true" to the prior-conviction allegation and evidence of the prior conviction was presented. (RRV – 5-6, 8-21) The punishment jury charge instructed, in pertinent part, as follows:

> Now . . . if you find from the evidence beyond a reasonable doubt that the Defendant, JOSE OLIVA, was convicted on JUNE 4, 2003 in Cause Number 1162140, in the COUNTY CRIMINAL COURT OF LAW #12 of Harris County, Texas, for the offense of driving while intoxicated, and that said conviction was a final conviction prior to the commission of the offense for which you have found the Defendant guilty, then you must so find and assess the Defendant's punishment at confinement in county jail for any term of not less than 30 days or more than one year. In addition to confinement, you may assess a fine not to exceed four thousand ($4,000) dollars.
>
> However, if you do not find from the evidence beyond a reasonable doubt that the Defendant is a repeat offender, you must assess his punishment at confinement in county jail for any term of not less than 72 hours or more than 180 days. In addition to confinement, you may assess a fine not to exceed two thousand ($2,000) dollars.

(CR – 109)

The punishment-phase verdict sheet listed alternative findings, which varied depending on whether the jury believed appellant was a repeat DWI offender. (CR – 112-13) The jury found that appellant had a prior DWI conviction and assessed a 180-day jail sentence. (CR – 112) Appellant's judgment noted his conviction was for "DWI 2nd" and designated the offense as a Class A misdemeanor. (CR – 114) The judgment also noted that a "not true" plea was entered for the "Plea to 1st Enhancement Paragraph," and a "true" finding was entered for the "Findings on 1st Enhancement Paragraph." (CR – 114)

In light of the complete trial procedure, the jury charges, and the judgment, it appears that the prior DWI conviction was treated as a punishment enhancement. (*See* CR – 105-109, 112-15; RRV – 8-21)

SUMMARY OF THE ARGUMENT

Because Texas Penal Code Section 49.09(a)[2] dictates that one prior DWI conviction raises the level of a charged DWI offense from a Class B misdemeanor to a Class A misdemeanor, the prior conviction is an element of DWI-second offenses. Therefore, this Court should hold as such and overrule authority that contends the prior conviction is a punishment enhancement.

[2] Although Section 49.09 describes several intoxication-related offenses, because DWI is the only Chapter 49 offense involved in this case, the State refers only to DWI in this brief.

ARGUMENT

I. Applicable Law

An offense element is defined as: 1) the forbidden conduct, 2) the required culpability, 3) any required result, and 4) the negation of any exception to the offense. TEX. PENAL CODE § 1.07(22); *see Schmutz v. State*, 440 S.W.3d 29, 34 (Tex. Crim. App. 2014) ("'element' is a fact legally required for a fact finder to convict a person of a substantive offense"). An indictment or information must by direct and positive averments allege all of the constituent elements of the offense sought to be charged. *Holley v. State*, 167 S.W.3d 546, 548 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd); *see* TEX. CODE CRIM. PROC. art. 21.03 ("[e]verything should be stated in an indictment which is necessary to be proved"). To sustain a conviction, all the elements of the offense must be proven at the guilt phase of trial and they must be proven beyond a reasonable doubt. *Calton v. State*, 176 S.W.3d 231, 234 (Tex. Crim. App. 2005); TEX. CODE CRIM. PROC. art. 38.03.

By contrast, an enhancement increases the punishment range above that ordinarily prescribed for the indicted crime. *Calton*, 176 S.W.3d at 233. A prior conviction alleged for punishment enhancement is not really a component element of the primary offense. *Id*. Instead, it is a historical fact to show the persistence of the accused and the futility of ordinary measures of punishment as related to him. *Id*. Prior convictions used as punishment enhancements must be pled in some

form, but they need not be pled in an indictment. *Brooks v. State*, 957 S.W.2d 30, 34 (Tex. Crim. App. 1997). When prior convictions are alleged for purposes of enhancement only and are not jurisdictional, the portion of the charging instrument reciting those convictions shall not be read until the punishment hearing is held. TEX. CODE CRIM. PROC. art. 36.01(a)(1); *see also Ex parte Benson*, 459 S.W.3d 67, 87-88 (Tex. Crim. App. 2015) (jurisdictional exception in Article 36.01 appears to be tacit a recognition that prior convictions that raise offense to felony status are to be treated as elements).

Class A misdemeanors are punished by a fine of up to $4,000 and/or confinement in jail for a term not to exceed one year. TEX. PENAL CODE § 12.21. Class B misdemeanors are punished by a fine of up to $2,000, and/or confinement in jail for a term not to exceed 180 days. *Id*. at § 12.22. Generally, a prior conviction for a Class A misdemeanor or felony raises the minimum punishment for a charged Class A misdemeanor offense to 90 days in jail, but the maximum sentence is still one year. *Id*. at § 12.43(a). A prior conviction for a Class A or Class B misdemeanor, or a felony, raises the minimum punishment for a charged Class B misdemeanor to 30 days in jail, while the maximum sentence remains 180 days. *Id*. at § 12.43(b).

II. The Fourteenth Court of Appeals correctly held that a prior DWI conviction is an element of Class A misdemeanor DWI-second offenses.

A. Current conflicts in authority on the issue

Currently, a conflict in authority exists as to whether prior DWI convictions should be treated as offense elements or punishment enhancements in DWI-second cases. Some courts, including this Court, have found or appeared to interpret the prior convictions as elements. *See Mapes v. State*, 187 S.W.3d 655, 658-61 (Tex. App.—Houston [14th Dist.] 2006, pet. ref'd) (stating "one prior DWI is a required element of the offense of Class A misdemeanor DWI under Section 49.09(a), to which the punishment enhancements under Sections 12.42 and 12.43 do not apply"); *see also Gibson v. State*, 995 S.W.2d 693, 694-97 (Tex. Crim. App. 1999) (stating that, under Section 49.09(b), prior intoxication offenses are elements of felony DWI and Section 49.09(b) should not be viewed as a punishment-enhancement statute similar to Section 12.43(d)); *Dryman v. State*, No. 05-15-00078-CR, 2015 WL 8044124, at *2 (Tex. App.—Dallas Dec. 7, 2015, pet. ref'd) (mem. op., not designated for publication) (noting prior DWI conviction is an element because "prior DWI conviction defines the new offense as a Class A misdemeanor and therefore enhances the offense, rather than the punishment").

Other authority can be read to support the contention that prior DWI convictions are elements. *See State v. Webb*, 12 S.W.3d 808, 811-12 n.2 (Tex.

Crim. App. 2000) (discussing, in controlled-substance case, statutory differences between enhanced offense and enhanced punishment); *compare with Ford v. State*, 334 S.W.3d 230, 235 (Tex. Crim. App. 2011) (under Code of Criminal Procedure Article 62.102(c)'s plain language, defendant's prior failure-to-register conviction did not increase the grade of his current offense, but increased only punishment level that applied to the primary offense), *and Navarro v. State*, 469 S.W.3d 687, 696 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (.15 alcohol allegation is an element of Class-A-misdemeanor DWI, and not a "basis for enhancement" because "this conversion represents a change in the degree of the offense, rather than just an enlargement of the punishment range for a Class B misdemeanor").

By contrast, some courts, including this Court, have found or appeared to interpret a prior DWI conviction as a punishment enhancement. *See Ex parte Benson*, 459 S.W.3d at 88 (noting Section 49.09's title may suggest that, at its inception, it created an offense enhancement by the two-prior-convictions provision, which raises offense to a felony and was jurisdictional, and a penalty enhancement by the one-prior-conviction provision, which raised the offense merely to a higher misdemeanor grade and was not jurisdictional); *State v. Cooley*, 401 S.W.3d 748, 749-51 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (while finding trial court's fine-only sentence in DWI-second case was illegally lenient, appellate court appeared to interpret 49.09(a) as a DWI-specific punishment-

enhancement statute); *Wood v. State*, 260 S.W.3d 146, 147-49 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (defense counsel was ineffective by allowing State to introduce evidence of defendant's prior DWI conviction during guilt phase of DWI-second trial in violation of Code of Criminal Procedure Article 36.01(a)(1), noting that State admitted reading enhancement paragraph to the jury was improper).

Other opinions—which rely directly or indirectly upon old Revised Civil Statute Article 6701/-1—also state that a prior DWI conviction is a punishment enhancement. *See Prihoda v. State*, 352 S.W.3d 796, 806 (Tex. App.—San Antonio 2011, pet. ref'd) (prior DWI conviction is an enhancement provision, not an element of a separate offense); *Blank v. State*, 172 S.W.3d 673, 676 (Tex. App.—San Antonio 2005, no pet.) (op. on reh'g) (same); *Love v. State*, 833 S.W.2d 264, 265-66 (Tex. App.—San Antonio 1992, pet. ref'd) (defendant's conviction under Article 6701/-1(d) was a DWI conviction, subject to enhanced punishment, and prior conviction was not an offense element); *see also Byrd v. State*, No. 14-96-00572-CR, 1997 WL 167152, at *1-2 (Tex. App.—Houston [14th Dist.] April 10, 1997, pet. ref'd) (not designated for publication) (defendant's sentence was within

punishment range for unenhanced DWI offense where the judgment showed no plea or finding regarding prior-DWI-conviction enhancement).[3]

Notably, although it was the precursor to several parts of Penal Code Chapter 49, Article 6701/-1 did not specifically label DWI-second offenses as Class A misdemeanors, but instead, read in relevant part:

> (d) If it is shown on the trial of an offense under this article that the person has previously been convicted one time of an offense under this article, the offense is punishable by: (1) a fine not less than $300 or more than $2,000; and (2) confinement in jail for a term of not less than 15 days or more than two years.

Act of May 18, 1983, 68th Leg., R.S., ch. 303 § 3, art. 6701/-1, 1983 Tex. Gen. Laws 1568, 1575-76, *repealed by* Act of May 8, 1993, 73rd Leg. R.S., ch. 900 § 1.15, 1993 Tex. Sess. Law Serv. 3589, 3707 (West); Act of May 24, 1995, 74th Leg. R.S., ch. 318 § 63, 1995 Tex. Sess. Law Serv. 2734, 2755 (West); *see also Ex parte Benson*, 459 S.W.3d at 84-87 (examining legislative and case-law history of DWI offenses).

Finally, some courts, including this Court, have described trial-court treatment of prior DWI convictions in DWI-second cases without addressing whether such treatment was correct. *See Flowers v. State*, 220 S.W.3d 919 (Tex. Crim. App. 2007) (examining sufficiency of punishment-phase evidence offered to

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[3] These cases are ultimately based on *Love*. *See Prihoda*, 352 S.W.3d at 806; *Blank*, 172 S.W.3d at 676; *Byrd*, 1997 WL 167152 at *1.

prove defendant had prior DWI conviction "and thus prove [the] enhancement allegation"); *State v. Morgan*, 160 S.W.3d 1 (Tex. Crim. App. 2004) (finding no jurisdiction over State's appeal from trial judge's decision to treat defendant's DWI information as charging a Class B misdemeanor with a Section 12.43 punishment enhancement, rather than a Section 49.09 Class A misdemeanor)[4]; *Seeker v. State*, 186 S.W.3d 36, 37-38 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd) (evaluating whether trial court considered incorrect punishment range where prior DWI conviction was presented in sentencing hearing and trial court found prior-conviction allegation not true)[5]; *see also Haas v. State*, 494 S.W.3d 819, 820-21 (Tex. App.—Houston [14th Dist. 2016, no pet.) (addressing sufficiency of punishment evidence where prior DWI conviction was treated as enhancement after information was amended to include .15 BAC allegation)[6]; *Rizo v. State*, 963

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[4] While declining to resolve the substantive issue, this Court disagreed with the State that the trial judge's order effectively terminated the prosecution of the Class A misdemeanor, noting that: 1) no matter how this Court were to rule, the prosecution would proceed; 2) the trial judge's ruling "forces the State to alter the information before trial can proceed in the manner in which the State chooses;" 3) the trial court's order affected only the possible punishment range; and 4) Section 49.09 is one of two Penal Code statutes "providing for potentially increased punishment in the case of a person's second offense of driving while intoxicated." *Morgan*, 160 S.W.3d at 4-5.

[5] The First Court of Appeals also noted the defendant "had been charged with a Class A misdemeanor and thus could be characterized as being considered for a Class A misdemeanor, even though the trial court was not going to assess [his] punishment as a Class A misdemeanor, having found the evidence insufficient to prove the enhancement paragraph that alleged the prior DWI conviction." *Seeker*, 186 S.W.3d at 38.

[6] Whether the prior DWI conviction would have been treated as a punishment enhancement or an offense element, had the .15 BAC allegation not been later included, was unaddressed by the appellate court. *See* TEX. PENAL CODE § 49.04(d); *Navarro*, 469 S.W.3d at 696; *Haas*, 494 S.W.3d at 820-21, 822 n.1.

S.W.2d 137, 138-39 (Tex. App.—Eastland 1998, no pet.) (addressing whether prior DWI conviction is "final" for enhancement purposes if sentence has not been imposed, under "special enhancement statute," Section 49.09)[7]; *Pratte v. State*, No. 03-08-00258-CR, 2008 WL 5423193, at *1 n.1 (Tex. App.—Austin Dec. 31, 2008, no pet.) (mem. op., not designated for publication) (noting that, because DWI-second is a Class A misdemeanor, prior-conviction allegation was necessary to establish Class A misdemeanor offense and is arguably an element, but also noting no jurisdictional difference between Class A and Class B misdemeanors and Article 36.01(a)(1)'s seeming bar to reading prior-conviction portion of information); *see also generally Vasquez v. State*, No. 13-11-00188-CR, 2012 WL 3612495, at *1 (Tex. App.—Corpus Christi Aug. 23, 2012, no pet.) (mem. op., not designated for publication) (description of trial procedure indicates that prior DWI conviction was treated as a punishment enhancement).

B. The plain language of Section 49.09(a) directs that a prior DWI conviction is an element of DWI-second offenses.

In discerning whether any given fact constitutes an element of an offense, appellate courts look to the plain language of the statute involved and apply that plain language if they are able to do so. *Calton*, 176 S.W.3d at 233; *see Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). "Where the statute is clear

[7] Although unclear in the opinion at which phase of trial the prior conviction was proven, it appears that the appellate court may have considered Section 49.09 to be a punishment-enhancement statute, specific to repeat intoxication offenses. *See Rizo* 963 S.W.2d at 138-39.

and unambiguous, the Legislature must be understood to mean what it has expressed, and it is not for the courts to add or subtract from such a statute." *Boykin*, 818 S.W.2d at 785 (quoting *Coit v. State*, 808 S.W.2d 473, 475 (Tex. Crim. App. 1991)). However, if a statute's language is ambiguous or its plain language would lead to absurd results, courts should not apply the language literally. *Boykin*, 818 S.W.2d.at 785.

Texas Penal Code Section 49.04 provides:

> (a) A person commits an offense if the person is intoxicated while operating a motor vehicle in a public place.
>
> (b) Except as provided by Subsections (c) [involving an open container in the vehicle] and (d) [involving a .15 alcohol concentration] and Section 49.09, an offense under this section is a Class B misdemeanor, with a minimum term of confinement of 72 hours.

TEX. PENAL CODE. § 49.04(a)-(b).

Section 49.09, titled "Enhanced Offenses and Penalties," states, in relevant part, as follows:

> (a) Except as provided by Subsection (b),[8] an offense under Section 49.04…is a Class A misdemeanor, with a minimum term of confinement of 30 days, if it is shown on the trial of the offense that the person has previously been convicted one time of an offense relating to the operating of a motor vehicle while intoxicated….

[8] Section 49.09(b) dictates when a DWI offense is a third-degree, second-degree, or first-degree felony. *Id.* at § 49.09(b)-(b-4).

Id. at § 49.09(a); *see also id.* at § 49.09(g) ("[a] conviction may be used for purposes of enhancement under this section or enhancement under Subchapter D, Chapter 12, but not under both this section and Subchapter D")[9].

After considering the plain language of Penal Code Section 49.09(a) and certain case law, the Fourteenth Court held that a prior DWI conviction is an element of DWI-second offenses. *Oliva*, 2017 WL 1155125 at *4-5 (citing *Ex parte Reinke*, 370 S.W.3d 387, 389 (Tex. Crim. App. 2012); *Calton*, 176 S.W.3d at 233; *Gibson*, 995 S.W.2d at 694-97; *Mapes*, 187 S.W.3d at 659-60).

Section 49.09(a)'s plain language affirms that the Fourteenth Court was correct in its holding. Section 49.09 is titled "Enhanced Offenses *and* Penalties," indicating that its contents include more than intoxication-specific punishment enhancements. *See* TEX. PENAL CODE § 49.09(a) (emphasis added). Section 49.09(a) also dictates that DWI "*is* a Class A misdemeanor…if it is shown on the trial of the offense that the person has previously been convicted one time" of DWI. *Id.* (emphasis added); *see id.* at § 49.04. "The legislature clearly knows the difference between enhancing the level of an offense and enhancing the level of

[9] Section 49.09(g) appears to permit the State to choose whether to charge a Class A misdemeanor DWI-second offense or, alternatively, a Class B misdemeanor DWI-first offense with a prior DWI conviction alleged only as a punishment enhancement. *Id.* at § 49.09(g). However, any argument that appellant was charged only with a Class B DWI and enhanced pursuant to Section 12.43(b) with another Class B misdemeanor that just happened to be a DWI would be disingenuous in light of the trial court's punishment jury charge and the judgment. (*See* CR – 8, 109, 114-15)

punishment." *Ex parte Reinke*, 370 S.W.3d at 389 (comparing language of Sections 49.07 and 49.09—"is a felony of the __ degree"—with language in Section 12.42—"shall be punished for a felony of the __ degree"). Notably, this same language is also in Section 49.09(b), which describes the felony DWI-third offense. TEX. PENAL CODE § 49.09(b).[10]

Section 49.09(a) does contain some language similar to punishment-enhancement statutes. *Compare id.* at § 49.09(a) ("if it is shown on the trial of the offense") *with id.* at § 12.43(a)-(b) (enhancing punishment minimum "[i]f it is shown on the trial of a Class [A or B] misdemeanor" that defendant has prior applicable convictions); *see also Wilson v. State*, 772 S.W.2d 118, 120, 122-23 (Tex. Crim. App. 1989), *superseded by statute as stated in Ex parte Benson*, 459 S.W.3d at 87 (finding serious-bodily-injury allegation under Revised Civil Statute Article 6701/-1 was punishment enhancement, not element, for DWI offense where "if it be shown on the trial" language—which identifies punishment enhancements—was used in the at-issue statute).[11]

However, Section 49.09(a) does not state that a DWI offense is "punishable as" a Class A misdemeanor upon proof of a prior conviction, or that the offense is

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[10] Other Penal Code statutes also include language designating a higher-level offense where the actor has prior convictions. *See* TEX. PENAL CODE §§ 43.02(c)(1), 43.26(d).

[11] *Wilson* also noted that the at-issue statute included language, "*of a person punished for an offense under Subsection (c), (d), or (e)*…" which clearly denoted that before the at-issue subsection was to be invoked, a defendant must be convicted of DWI. *Wilson*, 772 S.W.2d at 123 (emphasis in original). Such language does not appear in Penal Code Section 49.09(a).

"punished by" a particular term of confinement. *Compare with* TEX. PENAL CODE § 12.43(a)-(b) (providing where it is shown on the trial of a Class A or Class B misdemeanor that the defendant has been previously convicted of an applicable level of offense, "on conviction he shall be punished by" an enhanced minimum confinement term). Instead, Section 49.09(a) states that DWI-second offenses are Class A misdemeanors and that these offenses are subject to a unique punishment range of 30-days to one-year of confinement. *Id.* at § 49.09(a); *compare with id.* at §§ 12.21, 12.22, 12.43(a)-(b).

Although not directly related to DWI-second cases, this Court's opinion in *Calton v. State* is instructive as to the correct treatment of non-jurisdictional prior convictions that change the degree of an offense. *See* 176 S.W.3d 231. The *Calton* Court addressed whether, under a former version of Penal Code Section 38.04, a defendant's prior evading-arrest conviction should have been proven in the guilt phase of his felony evading trial. *See id.* at 232.

The at-issue statute in *Calton* dictated that an actor who used a vehicle to evade police 1) committed a state-jail felony if the actor had no previous evading convictions, or 2) committed a third-degree felony if the actor had been previously been convicted of evading. *See* TEX. PENAL CODE § 38.04(a)-(b) (West 2001). This Court held that the prior evading conviction was an element of the charged

evading offense. *Calton*, 176 S.W.3d at 233-34. In so finding, this Court noted no ambiguity in the statute, stating:

> [i]t defines third-degree evading arrest as occurring when the actor has previously been convicted of evading arrest. A conviction for this offense cannot occur until this element is proved. The statute does not set forth a higher punishment range for the offense when the prior conviction is proved. Instead, it requires proof of the prior conviction for the third-degree felony conviction to occur.

Id. at 234.

The same issue addressed in *Calton* is presented here.[12] Although Section 49.09(a) also provides for an enhanced punishment for DWI-second offenses, the plain language of the statute makes clear that DWI-second is a different offense level than DWI-first. *See Calton*, 176 S.W.3d at 233-34 (enhancement does not change the offense, or the degree of the offense, of conviction and there can be no enhancement until a person is first convicted of an offense of a certain degree). Failure to prove a prior DWI conviction during the guilt phase of a DWI trial necessarily means that the only offense proven is a Class B misdemeanor. *See* TEX. PENAL CODE § 49.04; *Calton*, 176 S.W.3d at 234 (to sustain a conviction, all the elements of the offense must be proven at the guilt phase of trial).

Under Section 49.09(a)'s plain language, the prior DWI conviction must be considered an element of this distinct offense and it must be proven at the guilt

[12] Like *Calton*, jurisdiction is not an issue here. *See* 176 S.W.3d at 234-35.

phase of trial. *Calton*, 176 S.W.3d at 236. Authority contending otherwise conflicts directly with the plain language of Section 49.09(a) as well as this Court's clarification in *Calton* that punishment enhancements do not change the level or grade of the charged offense. *See id.* at 233-34.

Therefore, this Court should affirm the holding of the Fourteenth Court and hold that a prior DWI conviction is an element of DWI-second offenses, which must be read to the jury, proven with evidence, and included in the jury charge during the guilt phase of trial.

CONCLUSION

It is respectfully requested that the Fourteenth Court's decision be affirmed.

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